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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 654

EMMETT R. WARRING, PETITIONER

v.

RAY L. HUFF, GENERAL SUPERINTENDENT, DISTRICT PENAL INSTITUTIONS

No. 655

EMMETT R. WARRING, PETITIONER

v.

JOHN B. COLPOYS, UNITED STATES MARSHAL

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals (R. 44–51) are not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered July 29, 1941 (R. 52–53). The petition for writs of certiorari was filed September 25, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a sentence under the Summary Criminal Contempt Statute, which prescribes no maximum punishment, comes within the terms of the Indeterminate Sentence Act for the District of Columbia, which provides that a person convicted of a felony shall be sentenced for a maximum period not exceeding that fixed by law and for a minimum period not exceeding one-fifth of that maximum.

2. Whether the decision of this Court in *Nye* v. *United States,* 313 U. S. 33, should be applied retroactively so as to invalidate certain sentences involved in the instant case.

STATUTES INVOLVED

Section 3 of the Act of July 15, 1932, 47 Stat. 696, 697 (D. C. Code, 1929, Supp. V, Title 6, Sec. 453), provides:

> In imposing sentence on a person convicted in the District of Columbia of a felony, the justice or judge of the court imposing such sentence shall sentence the person for a maximum period, not exceeding the maximum fixed by law, and for a mini-

> mum period not exceeding one-fifth of the maximum period fixed by law, and any person so convicted and sentenced may be released on parole as herein provided at any time after having served the minimum sentence.

Section 268 of the Judicial Code (28 U. S. C. Sec. 385), called herein the Summary Criminal Contempt Statute, provides:

> The said courts shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

STATEMENT

Petitioner, who had the advice and assistance of counsel, pleaded guilty in the District Court of the United States for the District of Columbia to and was sentenced for four criminal contempts, which are here designated as Cases Nos. 98, 99, 100, and 101 (R. 40–41). He was also sentenced upon a plea of guilty upon a charge of criminal conspiracy (R. 22–23).

It appears from the petitions of the United States Attorney for a rule to show cause that the contempt charged in No. 98 was that petitioner endeavored to influence, by attempted bribery and other means, the vote of a prospective petit juror in a pending criminal case in which petitioner was a defendant (R. 24–27), and that in No. 99 he was charged with investigating the possibility of influencing another prospective petit juror for the same purpose (R. 28–31). The petitions also disclose that while petitioner's misconduct took place in the District of Columbia, it occurred prior to the trial of the criminal case and at some distance from the courthouse.[1]

Petitioner was given a sentence of one year and one month in No. 98 (R. 40); six months in No. 99, to run concurrently with the sentence in No. 98 (R. 40); one year and one month in No. 100, to begin upon the expiration of the sentence in No. 98 (R. 41); and six months in No. 101, to run concurrently with the sentence in No. 98 (R. 41). He was also sentenced to imprisonment for from three to nine months upon the conspiracy charge, which sentence was to begin upon the expiration of the sentence imposed in No. 100 (R. 23).[2]

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[1] Since petitioner does not question the power of the District Court to proceed under the Summary Criminal Contempt Statute in Cases Nos. 100 and 101, it is unnecessary to summarize the charges in those cases.

[2] Petitioner's term of imprisonment will expire on January 23, 1942, he having forfeited any good time allowance because of misconduct (R. 23).

Petitioner filed petitions for writs of habeas corpus in the District Court of the United States for the District of Columbia (R. 2–4, 12–14, 18–21). The writs issued (R. 4–5, 15) and answers to the petitions and returns to the writs were filed on behalf of the respondents (R. 5–7, 16–18, 21–23). The District Court, after a hearing, discharged the writs, dismissed the petitions, and remanded the petitioner to the custody of respondents (R. 8–9, 41–42). The Court of Appeals affirmed the orders of the District Court (R. 44–53).

ARGUMENT

I

Petitioner urges that he was invalidly sentenced in contempt proceedings 98 and 100 because the sentences were for felonies and were not imposed in accordance with the Indeterminate Sentence Act for the District of Columbia (Pet. 15–23).

As the Court of Appeals pointed out, it is unprofitable to endeavor to determine the nominalistic question whether a criminal contempt is an offense, crime, felony or *sui generis,* since it is patently impossible to apply the Indeterminate Sentence Act to sentences for criminal contempts, and, consequently, it cannot be thought that Congress intended that such sentences should fall within the statute's terms (R. 45). The Indeterminate Sentence Act provides that the judge in imposing sentence for a felony shall prescribe a maximum period, not exceeding the maximum fixed by

law, and a minimum period not exceeding one-fifth of that maximum. The Summary Criminal Contempt Statute, however, specifies no maximum; it leaves the sentence entirely within the discretion of the trial judge. It is, of course, impossible to determine one-fifth of a nonexistent maximum. The decision of the Court of Appeals was clearly correct.[3]

In *Anderson* v. *Rives,* 85 F. (2d) 673 (App. D. C.), the court held, for a like reason, that the Indeterminate Sentence law does not apply to second degree murder, for which the maximum punishment is life.

II

Petitioner also contends, in effect, that this Court's decision in *Nye* v. *United States,* 313 U. S. 33, rendered on April 14, 1941, retroactively invalidated the sentences imposed upon him on February 24, 1939, in Cases Nos. 98 and 99 (Pet. 25–35).

In the *Nye* case, it is true, this Court in ruling that the analogous misconduct of Nye and Mayers did not come within the purview of the Summary Criminal Contempt Statute, reversed their convictions and held that if they could be punished for

[3] It does not follow from the court's decision that persons in the situation of petitioner are deprived of an opportunity to apply for parole. Apparently by analogy to the Federal Parole Act (18 U. S. C., Sec. 714), petitioner was permitted, after he had served one-third of the aggregate of his sentences, to apply for parole. This application was denied, as was a later application.

the misconduct, it must be under the provisions of the Criminal Code, with the normal safeguards surrounding criminal prosecutions, even though it conceded that under its prior decision in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, which it then overruled, the court below did not err in affirming the judgment of conviction (pp. 52–53). The Court, therefore, gave its decision a retroactive effect in that it freed Nye and Mayers, although their misconduct was punishable summarily under the *Toledo Newspaper* case. But in the *Nye* case this Court's action was taken in an appellate proceeding to review a judgment of conviction, not in a collateral proceeding. In another case the Circuit Court of Appeals for the Fifth Circuit, on the basis of the *Nye* decision, discharged a defendant whose misconduct was analogous to that of Nye and Mayers, but the Government did not apply for certiorari since the court's action was taken upon an appellate review of the judgment of conviction. *Wimberly* v. *United States,* 119 F. (2d) 713.

No such consideration motivates a declaration of retroactivity in the present case. On the contrary, there are compelling reasons against retroactivity.

The *Nye* decision did not absolve from punishment activity formerly condemned; it held only that another type of procedure was requisite. The attack upon petitioner's sentences is a collateral attack. These sentences, rendered over two years

prior to the *Nye* decision, were fully justified by the decision of this Court in the *Toledo Newspaper* case and by its intervening decisions.[4] Petitioner, although represented by counsel, did not question these decisions in the contempt proceeding. Indeed, evidently upon the advice of counsel, he pleaded guilty. Realistically, from the standpoint of the normal safeguards surrounding criminal prosecutions, he lost nothing by being proceeded against under the Summary Criminal Contempt Statute rather than under the Criminal Code. It is evident that in both the cases involved (Nos. 98 and 99) other persons were associated with him in his endeavors to influence prospective petit jurors (R. 24–30). Consequently, he could have been prosecuted for a conspiracy under Section 37 of the Criminal Code (18 U. S. C., Sec. 88) corruptly to influence petit jurors or to obstruct the due administration of justice, in violation of Section 135 of the Criminal Code (18 U. S. C., Sec. 241). Under Section 37 he could have been imprisoned for two years. He was actually sentenced to imprisonment for one year and one month. It is true that he would have had the benefit of an indictment based on probable cause instead of a petition by the United States Attorney for a rule to show cause, but the United States Attorney is a responsible official, he swore to his petition, and the plea of guilty

[4] *Craig* v. *Hecht*, 263 U. S. 255; *Sinclair* v. *United States*, 279 U. S. 749.

makes it manifest that there was adequate basis for the petition. Moreover, it is by no means certain that the United States Attorney could not have proceeded by an indictment under the Summary Criminal Contempt Statute (*Gompers* v. *United States,* 233 U. S. 604, 610–611, 612), for which there obviously would have been probable cause. Since, with the advice of counsel, petitioner believed that there was no defense to the Government's case, it is not to be assumed the plea would have been different. Nor is it to be supposed that a different course of action would have been taken if petitioner had been indicted under the Criminal Code. With a plea of guilty to such an indictment, petitioner, of course, would not have been entitled to a jury trial, so he did not suffer on that score because he was not indicted under the Criminal Code. In summary, since the misconduct of petitioner occurred less than three years ago (R. 24–30) and is yet indictable under the Criminal Code (18 U. S. C., Sec. 582), the net effect of a sustaining of petitioner's contention that the *Nye* decision should be applied retroactively so as to invalidate his sentences would be merely to require the institution of another proceeding which should have no different result. There is, of course, no absolute certainty as to this, but we are not dealing here with a direct attack on the conviction but with the elements to be considered in de-

termining the retroactive application of the *Nye* decision.

This and other courts have not hesitated by various formulae to disregard traditional concepts as to the retrospective effect of overruling decisions or, analogously, declarations of statutory invalidity, where the ends of justice require it. *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, and *Chicot County Dist.* v. *Bank*, 308 U. S. 371.[5] As is apparent from the articles cited in footnote 5 and the decisions they discuss, the movement toward a reexamination in each case of the ancient doctrines has not been limited to cases in which contract or property rights are involved, but has extended also to criminal cases.[6] There are several decisions in the state courts in which defendants have been protected against a retroactive change in construction of a penal statute. See, e. g., *State* v. *Bell*, 136 N. C. 674; *State* v. *O'Neil*, 147 Ia. 513; *State* v. *Jones*, 44 N. M. 623; *State* v. *Longino*, 109 Miss. 125; *Odom* v. *State*, 132 Miss. 3. The plainest principles of justice demanded that defendants

[5] The numerous authorities are collated and discussed in Snyder's *Retrospective Operation of Overruling Decisions*, 35 Ill. L. Rev. 121, Freeman's *The Protection Afforded Against the Retrospective Operation of an Overruling Decision*, 18 Col. L. Rev. 230, and Boskey & Braucher's *Jurisdiction on Collateral Attack, October Term, 1939*, 40 Col. L. Rev. 1006.

[6] 18 Col. L. Rev., pp. 245–250; 35 Ill. L. Rev., pp. 142–143.

be not penalized for acts which under existing decisions were not criminal. Conversely, there is no reason why the overruling decision should be applied to the benefit of a defendant where the ends of justice would not be served. If a state court may, consistent with the Federal Constitution, refuse to make an overruling decision retroactive (*Gt. Northern Ry.* v. *Sunburst Co.*, 287 U. S. 358, 364–365), it cannot be doubted that a Federal court has a like power. If, as we submit, the *Nye* decision should not, in view of the circumstances, be applied retroactively to petitioner's case, there can be no doubt that there is no jurisdictional problem in connection with the sentences in cases Nos. 98 and 99, and that the petition for writ of habeas corpus was properly denied.[7]

It may also be pointed out that so far as we can ascertain petitioner's case is an isolated one. In view of the relatively short sentences given in criminal contempt cases it is unlikely that many other contemnors charged with misconduct analogous to that in the *Nye* case are still incarcerated.

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[7] If this Court should grant the petition for writ of certiorari, it would seem that it might well eliminate from its consideration the sentence in Case No. 100, since the only point urged in connection with that sentence is that it should have been imposed in accordance with the Indeterminate Sentence Law, a point, we believe, to be patently without merit.

CONCLUSION

The case was correctly decided below and presents, undoubtedly, an isolated situation. We therefore respectfully submit that the petition for writs of certiorari should be denied.

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